IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10/01/2003

CORAM

THE HONOURABLE MR.JUSTICE A.S.VENKATACHALAMOORTHY
AND
THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

A.S.No.400 of 1987

1. Ramamurthi
2. Perumal Gounder
(rep. by Guardian
and next friend
1st appellant) .. Appellants

-Vs-

1. Chinnaraju Gounder
2. Perumal Gounder (deceased)
3. V.Ranganadha Gounder
4. Ramasami
5. Saroja
6. Pachiammal
7. Naina
8. Chinnaraj
9. Mani
10.Chinnakasi
(RR4 to 10 are brought on record as
LRs of R2 as per order in CMP
1502/98 dated 8.1.2003) .. Respondents

This appeal suit has been preferred under S.96 of The Code of Civil Procedure against the judgment and decree of the Subordinate Judge, Thiruvannamalai in O.S.No.18 of 1984 dated 21.11.1986.

!For Appellants : Mr.V.Raghavachari

^For Respondents : Mr.S.Sundar for
Mr.T.R.Rajaraman for R2

No appearance for other
respondents
:JUDGMENT

M.CHOCKALINGAM, J.

Plaintiffs are the appellants herein.
2. This appeal has arisen from the judgment and decree of the learned Subordinate Judge, Thiruvannamalai whereby the suit for partition and separate possession instituted by the plaintiffs was dismissed.
3. The plaintiffs filed the plaint with the following averments:
The plaintiffs who are the sons of the third defendant, constitute a joint Hindu family. The ancestral properties to the extent of 2 acres and 10 cents of wet land and 1 acre of dry land were given to their father in the family partition. The 3rd defendant purchased the suit properties out of the income from those properties, and the patta stands in his name. He stayed most of the days in the town and spent most of his time in playing cards and drinking. The entire income from the joint family lands was spent by him for his immoral and illegal purposes. The 2nd defendant took a pronote from him in 1971. The said pronote was executed for Rs.1,500/- in favour of the first defendant, son of the second defendant. On the basis of the said pronote, the first defendant filed a suit in O.S.610/74 on the file of the District Munsif of Thiruvannamalai and obtained a decree against the third defendant. Thereafter, the first defendant brought the suit properties to sale in R.E.P.No.279/82. The suit properties were purchased by the second defendant in Court auction without the permission of the Court, benami, for the benefit of the first defendant. The suit properties worth Rs.75,000/-. The 2nd defendant purchased the suit lands for a paltry sum of Rs.2,010/- on 24.11.82. The 3rd defendant has not taken any steps to set aside the sale made through court auction. The sale was confirmed on 21.2.83. The debt for which the suit properties have been sold, has been contracted for the illegal and immoral purposes of the third defendant. The sale is not binding on the plaintiffs. Though the second defendant took paper delivery of the suit properties, he has not taken actual possession. The plaintiffs alone are in possession and enjoyment of the suit properties. The agricultural operations in the suit properties were attended by the plaintiffs and their mother. Hence, the suit may be decreed.
4. The first defendant filed a written statement alleging that it is the duty of the plaintiffs to establish that the plaintiffs and the third defendant constituted a joint Hindu family; that the alleged partition is not true; that it is false to state that the suit properties were purchased from and out of the income from the ancestral properties; that the suit properties were the self acquisitions of the third defendant; that the patta stands in the name of the third defendant, and he alone was in possession and enjoyment of the suit properties; that the suit properties are not joint family properties; that the third defendant has not been indulging in immoral activities; that the third defendant borrowed Rs.1500/- from the first defendant and executed a pronote in his favour; that since the third defendant failed to repay the said amount, the first defendant was constrained to institute a suit in O.S.No.610/74 against him for recovery of money, and a decree was obtained on 17.7.74; that execution proceedings was initiated and the properties were brought to court auction; that the 2 nd defendant took the properties in court auction on 24.11.82, and the sale was confirmed on 21.2.83; that the 2nd defendant took possession through Court on 29.8.83; that the said sale through court auction was valid; that the plaintiffs have no right to question the court auction; that the first plaintiff was not the natural guardian of the second plaintiff, and hence, the suit may be dismissed

with costs.
5. In his written statement, the second defendant has averred as follows:
The suit properties are admittedly the self acquired properties of the 3rd defendant. The third defendant did not leave the Village and settled down at Tiruvannamalai. The third defendant's main avocation was only agriculture. The so called money was borrowed by the third defendant who was the family Manager, for family purposes. There is no electric motor or pumpset in the well situated in S.No.23 /1. The defendants 1 and 2 have become divided by means of a registered partition deed. There is no question of the 2nd defendant purchasing the property without the permission of the Court, benami, for the benefit of the first defendant. Since the defendants 1 and 2 are divided members of the family, there is no necessity for the second defendant to make such a purchase. The delivery of the property sold in court auction in favour of the 2nd defendant was effected through process of Court. The 2nd defendant undertook to discharge the debt due in favour of the Thandrampet Cooperative Land Development Bank to the tune of Rs.16925.44 up to 1.5.83. The 2nd defendant also paid kist. In these circumstances, it is futile on the part of the plaintifs to contend that there was only a paper delivery. Inasmuch as the alienee is in possession and enjoyment of the property, the plaintiffs cannot be deemed to be in joint possession of the property. The suit which is highly frivolous and vexatious, may be dismissed with costs.
6. On the above pleadings, the trial Court framed five issues, tried the suit and dismissed the same. Aggrieved plaintiffs have brought forth this appeal.
7. Arguing for the appellants, the learned Counsel Mr.V. Raghavachari would submit that the suit properties with an extent of 7 acres and 14 cents were purchased by the third defendant from and out of the considerable income from the fertile landed properties, which came to his hand on family partition; that in order to prove the character of the suit properties as joint family properties, the plaintiffs have examined the first plaintiff as P.W.1 and the mother of the plaintiffs as P.W.2, and apart from that, they have marked Exs.A1 to A5 documents; that from the pattas filed by the plaintiffs, it would be clear that there were family properties, and those properties in the hands of the third defendant were ancestral; that the third defendant possessed sufficient properties, which formed the nucleus for the acquisition of the suit properties under Ex.A5, and hence, it has got to be held that the suit properties were joint family properties, in which the plaintiffs were entitled to 2/3rd share; that the first and second defendants were closely related as father and son; that while the first defendant obtained a decree in a money suit and brought the suit properties with an extent of 7 acres and 14 cents for court auction sale, the second respondent has purchased the same; that it is pertinent to note that the third defendant has not exercised care, but was negligent in taking any steps to stop the court auction sale or steps to set aside the same for the irregularities; that the sale would not confer any right, title or interest on the second defendant other than that of the share of the third defendant, who was a judgment debtor; that it is pertinent to note that the decree passed in O.S.61 0/74 was a decree passed on a promissory note executed by the first defendant in his individual capacity and not as the kartha of the joint family; that both the plaintiffs were minors at that time, and hence, their interest in the suit

properties could not have been brought to sale pursuant to the decree given in the said suit; that it remains to be stated that the suit properties were worth more than Rs.75,000/-, but they were auctioned for a paltry sum of Rs.2,010/-, and thus, there were lot of irregularities in the proclamation of the sale, which would directly affect the validity of the sale; that from the available evidence, the lower Court should have easily inferred the fraud on the part of the first and second defendants in knocking away the property as stated above, in view of the deliberate under-valuation of the property and suppression of the material facts in publication of the sale; that the lower Court has thoroughly failed to see that when the interest of the father in the joint family was sufficient to satisfy the decree debt, it should have construed the decree only as being put into execution as against the judgment debtor's interest and not against the entirety of the suit items; that it is pertinent to note that the respondents 1 and 2 have not proved by any documentary evidence to discharge the onus of proof expected from them; that the plaintiffs have specifically pleaded in the plaint that the third defendant was indulging in illegal and immoral activities during the relevant period and have adduced satisfactory evidence through P.Ws.3 and 4 apart from P.Ws.1 and 2 and have proved the same; that since the third defendant has contracted the said loan transaction in order to satisfy his illegal and immoral activities, those debts, consequent decree and the auction sale would not be binding on the plaintiffs, and hence, the judgment of the lower Court has got to be set aside and the appeal be allowed.

8. Contrary to the above contentions, the learned Counsel Mr.S. Sundar for Mr.T.R.Rajraman, appearing for the contesting respondent would submit that the plaintiffs have brought forth the suit only at the instigation of the third defendant; that the third defendant has borrowed Rs.1,500/- from the first defendant in the year 1970, and on default of the repayment, the first defendant filed the suit, obtained a decree, attached the property in execution and brought the same for sale; that the suit properties were sold in court auction sale wherein the second defendant purchased the same; that on confirmation of the sale, he got possession of the property, and thus, he is in possession of the same, and hence, the contention of the appellants' side that they are in possession of the properties has got to be rejected; that the plaintiffs have neither proved the existence of any ancestral property or any income therefrom to hold that the suit properties were purchased by the third defendant out of the income derived from the joint family properties, but on the contrary, the third defendant was doing contract business, and the suit properties were purchased by him out of his income therefrom; that the second defendant after the purchase of the properties, has paid back two mortgage loans to the extent of Krs.25,000/-; that he has made improvements in the suit lands; that he installed an electric motor and pumpset; that the property has also been partitioned among the members of the second defendant' s family; and that the contention of the appellants' side that the loan amount borrowed by the third defendant was spent for immoral and illegal activities was only a ruse invented for filing a false case like this. Added further the learned Counsel that subsequent to the filing of the instant suit for partition the third defendant and the plaintiffs have jointly executed a sale deed in the year 1986, as found under Ex.B1 document, which would clearly indicate that the plaintiffs have filed the suit only at the instigation of the third defendant, and thus, there are no merits in the appeal, and the appeal has got

to be dismissed.

9. As seen above, the appellants/plaintiffs instituted the civil action seeking partition of the plaint Schedule mentioned landed properties situated in Thandrampet, Tiruvannamalai District alleging that those properties were purchased by their father, the third defendant from third parties and out of the incomes of the ancestral agricultural lands, which were very considerable, and thus the suit properties had the character of joint family properties; that they were entitled to 2/3rd shares; that the third defendant spent the entire income from the joint family lands for his immoral and illegal purposes; that the suit properties were sold in court auction, pursuant to a decree granted in favour of the first defendant in a suit filed by him in O.S.No.610/74 based on a promissory note; that the loan amount covered under the promissory note was fully spent by the third defendant for his immoral activities, and thus, at the time of the borrowal, filing of the said suit, the decree and the court auction sale, the plaintiffs continue to have 2/3rd shares in the suit properties; that neither those transactions of borrowal nor the court auction sale would bind their interest; that the entire property of 7 acres and 14 cents was sold for a paltry sum of Rs.2,010/-, while they were easily worth Rs.75,000/-; that the auction purchaser has taken only a paper delivery pursuant to the court auction sale, but the plaintiffs continue to be in possession of the property, and hence, the decree for partition has got to be granted in their favour. The third defendant remained exparte. The contesting defendants 1 and 2 inter alia have raised the defence that the third defendant borrowed the money covered under the promissory note for his family needs; that he had no illegal or immoral activities; that the properties, which are the subject matter of Court auction sale and the present suit, were personal acquisitions of the third defendant; that there was no joint family nucleus or income to make purchase of the suit properties; that the third defendant, who suffered a decree, has instigated his sons viz. the appellants/ plaintiffs to file the instant suit, after a long lapse of years; that it was not correct to state that the properties were undervalued, but the properties were sold, after properly fixing the upset price; that subsequent to the court auction sale, the sale was confirmed, and the second defendant took delivery of the properties, and the same has also been recorded, and thus, the second defendant is in possession of the properties, and hence, the suit has got to be dismissed.

10. Admittedly, the non payment of the principal of Rs.1,500/- and the interest thereon due under a promissory note executed by the third defendant in favour of the first defendant in the year 1971, constrained the first defendant to file a suit in O.S.No.610/74. Pursuant to a decree passed on 17.7.1974, the same was put in execution in E. P.No.270/82, wherein the suit properties were attached and brought for sale. In the court auction sale held on 24.11.1982, the second defendant purchased the suit properties, and the said sale was confirmed on 21.2.1983. It is contended by the respondents' side that the second defendant had taken possession of the suit properties through Court delivery on 29.8.1983 has got to be accepted in view of the documentary evidence.

11. The appellants have mainly rested their claim for partition stating that the third defendant got 2 acres and 10 cents of wet land and 1 acre of dry land as his ancestral properties allotted to him in the family partition between him and his father and brothers; that out of the income from

those fertile lands, which was considerable, the third defendant father purchased the suit properties viz. 7 acres and 14 cents, and thus, the suit properties possessed the character of joint family properties. They have relied on the evidence of the first plaintiff examined as P.W.1 and the wife of the third defendant examined as P.W.2 and also relied on the documents marked as Exs.A1 to A5 . P.Ws.1 and 2 have stated that the third defendant was allotted 1/8

th share in the family properties. The Court is of the considered view that from the said oral and documentary evidence, much relied on by the plaintiffs' side, it would be highly difficult to accept the case of the plaintiffs that there were any joint family properties in the hands of the third defendant, which would yield surplus and sufficient income to purchase the suit properties. Though it is stated that the third defendant got 2 acres and 10 cents of wet land and 1 acre of dry land by a family partition, neither any material is placed as to the alleged partition nor any particulars are furnished to accept the same. Neither P.W.1, who is not even competent to speak about the fact of partition, nor P.W.2, the wife of the third defendant has spoken anything about the alleged partition.

12. The learned Counsel for the appellants pointed out that the property of 5 acres and 63 cents covered under Ex.A1 patta was an ancestral property, which would clearly indicate that the third defendant should have got his share from the said property. A perusal of the said document would clearly indicate that it was only a patta, which stood in the name of one Kuppa Gounder, who according to P.W.1, was the brother of the father of the third defendant, and in the absence of any other evidence, it cannot be inferred that the third defendant had any right, interest or share in the lands covered under Ex.A1 patta, which stood in the name of his paternal uncle. A patta issued in the name of the third defendant under Ex.A2 was only for a piece of punja land measuring 59 cents. It is not in dispute that the properties covered under Ex.A3, though characterised as 'Vazhimurai', were actually purchased by the third defendant, and hence the recital found as 'Vazhimurai' cannot be relied upon by the plaintiffs to call it as joint family properties. Two pieces of lands measuring 68 cents and 6 0 cents were purchased under the Exs.A4 and A5 sale deeds by the third defendant. Thus, taking into consideration the above documentary evidence, it would be quite evident that the third defendant was in total possession of the landed properties not exceeding 2 acres of lands.

13. Admittedly, the properties in question viz. 7 acres and 14 cents were purchased by the third defendant on 21.12.1968 under Ex.B8 for a consideration of Rs.6,000/-. It is specifically pleaded by the plaintiffs that the third defendant had no other source of income except the agricultural operations over the ancestral properties. Under such circumstances, a duty is cast upon the plaintiffs to prove that there was sufficient income from those family properties; and that the same was surplus and adequate, after meeting the expenses connected with the family. In the instant case, it is an admitted position that the third defendant was living with his wife and five children under the same roof during the relevant period. In the absence of

all the necessary and requisite proof as to the existence of the joint family nucleus, the surplus income therefrom and the utilisation of the same for the purchase of the suit properties under Ex.B8, without any hesitation the contention of the plaintiffs' side that the suit properties possessed the character of joint family properties has got to be rejected.

14. Equally the contention put forth by the appellants' side that the third defendant was indulging in illegal and immoral activities; that he did not evince interest in the family affairs; that the amounts borrowed by him from the first defendant under a promissory note were spent by the third defendant for those purposes, and hence, the loan transaction and the Court auction sale transaction would not be binding on them has got to be rejected. The first defendant filed a suit in O.S.No.610/74 for recovery of a sum of Rs.1,500/- on the basis of a promissory note executed by the third defendant in his favour on 30.10.1971. There is absolutely no evidence to indicate that the third defendant was leading a wavered life or indulging in immoral and illegal activities in or about 1970, when he has borrowed the loan covered under the said promissory note. Though the plaintiffs have examined two witnesses in that regard, their evidence did not advance the said plea put forth by the plaintiffs, since they did not speak anything about the activities of the third defendant at the time of his borrowal. Likewise P.W.1 the first plaintiff and P.W.2, the mother of the plaintiffs, who are interested in obtaining a decree for partition, have come forward to speak falsehood by stating that the third defendant was indulging in illegal and immoral activities. Needless to say that while the plaintiffs have come forward to assail the loan transaction covered under the promissory note, which subsequently culminated in a decree and court auction sale, by stating that the said loan transaction was brought about by the third defendant father for illegal and immoral purposes, the plaintiffs have to necessarily aver and strictly prove that the same was for immoral or illegal purposes. In the instant case, except the bald allegation that the third defendant was indulging in immoral and illegal activities, the plaintiffs have not satisfactorily discharged their onus in proving that either the third defendant was indulging in immoral and illegal activities or the consideration covered under the promissory note was actually spent for those purposes. Thus, the Court is unable to see any merit in the said contention put forth by the appellants' side.

15. Apart from all the above, the Court is able to see force in the contention put forth by the respondents' side that the instant suit was filed at the instigation of the third defendant. Admittedly, the said suit filed by the first defendant in O.S.No.610/74 for recovery of the principal and interest due on the promissory note was decreed on 17.7.74, and the suit immovable properties were attached in E.P. No.270/82 and sold in court auction on 24.11.82. On confirmation of the said sale on 21.2.1983, the second defendant auction purchaser took delivery of the same through Court on 29.8.1983. The contention of the respondents' side that in the execution proceedings, the third defendant appeared and contested the same is not disputed by the plaintiffs. It is pertinent to note that the third defendant, though a party to the present suit for partition, has not appeared, nor has he been examined as a witness by the plaintiffs to prove any one of the allegations found in the plaint. The contention of the respondents' side that the second defendant subsequent to the auction purchase has discharged a

mortgage debt of Rs.16,925.44 and subsequent interest relating to a mortgage created by the first defendant in respect of the suit properties in favour of Thandrampet Cooperative Land Development Bank is not disputed by the plaintiffs. It remains to be stated that the instant suit for partition was filed by the plaintiffs only in February 1984 i.e. number of months after the property was taken delivery by the second defendant. One of the strong circumstances, which would be indicative and demonstrative of the instigation made by the third defendant and the collusion of the plaintiffs and the third defendant in filing the suit is evident from the sale deed executed by the third defendant and the plaintiffs jointly on 29.7.1986 under Ex. B1 in respect of an ancestral agricultural land. The appellants are unable to tender any explanation why the said landed property covered under Ex.B1 was not included for partition in the present suit. Under the stated circumstances, it would be clear that the third defendant, his wife P.W.2 and the plaintiffs, who were all along living under the same roof, were well aware of all the earlier court proceedings, and after the delivery of the suit properties to the second defendant pursuant to the court auction sale, the plaintiffs at the instigation of the third defendant have come forward with the instant suit, seeking partition over the same with all possible false allegations. The Court is unable to see any merits in the contentions put forth by the appellants/plaintiffs' side. There is no reason to interfere either in the findings recorded or the decision arrived at by the Court below. Hence, the judgment and decree of the lower Court has to be sustained.

16. In the result, this appeal suit is dismissed, leaving the parties to bear their own costs.

Index: Yes
Internet: Yes
To:
The Subordinate Judge,
Tiruvannamalai.

nsv/